UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK
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SABRINA THOMAS,

Plaintiff,

-against-

ECD NY INC., BARRY MCKENNA, individually, and GARY SMITH, individually,

Defendants.

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Civ. No. 17-cv-6139

COMPLAINT

PLAINTIFF DEMANDS A TRIAL BY JURY

Plaintiff SABRINA THOMAS ("Plaintiff"), through her attorneys, DEREK SMITH LAW GROUP, PLLC, hereby complains of defendants ECD NY INC., BARRY MCKENNA, and GARY SMITH (collectively, "Defendants"), upon information and belief, as follows:

NATURE OF CASE

1. Plaintiff complains pursuant to Title VII of the Civil Rights Act of 1964, as codified, 42 U.S.C. §§ 2000e to 2000e-17 (amended in 1972, 1978 and by the Civil Rights Act of 1991, Pub. L. No. 102-166) ("Title VII"), Equal Pay Act, 29 U.S.C. § 206(d) and 29 U.S.C. § 215(a)(3) (the "EPA"), New York State Human Rights Law Executive Law § 296 et seq. (the "NYSHRL"), New York Labor Law §§ 194, 198, and the Administrative Code of the City of New York § 8-107 (the "NYCHRL"), as amended by the Restoration Act of 2005, based upon the supplemental jurisdiction of this Court pursuant to *United Mine Workers of America v. Gibbs*, 383 U.S. 715 (1966) and 28 U.S.C. §1367, seeking declaratory and injunctive relief and damages to redress the injuries that Plaintiff has suffered as a result of sex/gender discrimination, retaliation, and unlawful termination by Defendants.

JURISDICTION AND VENUE

2. Jurisdiction of this action is conferred upon this Court as this action involves a Federal Question under Title VII and the EPA. The Court also has jurisdiction pursuant to 29 U.S.C. §2617; 28 U.S.C. §1331, §1343 and pendent jurisdiction thereto.

3. Additionally, this Court also has supplemental jurisdiction over the State and City causes of action asserted herein.

4. Around November 14, 2016 Plaintiff filed a charge with the United States Equal Employment Opportunity Commission ("EEOC").

5. Around August 7, 2017, Plaintiff received a Right to Sue Letter from the EEOC.

6. Plaintiff satisfied all administrative prerequisites and is filing this case within ninety (90) days of receiving the Right to Sue Letter.

7. Venue is proper in this District based upon the fact that the events or omissions that give rise to the claims asserted herein occurred within the Eastern District of New York.

PARTIES

8. Plaintiff is a female and resident of Queens County, New York.

9. Defendant, ECD NY INC. (hereinafter referred to as "ECD") is a domestic business corporation duly existing by the virtue and laws of the State of New York that does business in the State of New York. ECD is an employer for purposes of the Title VII claims made herein, and may sue or be sued, and its principle place of business is 3512 19th Avenue, Suite 2W, Astoria, New York, 11105.

10. At all times material, Defendant ECD employed Plaintiff as a fire guard.

11. At all times material, Defendant, BARRY MCKENNA (hereinafter referred to as "MCKENNA") was and is the President of Defendant ECD.

12. At all times material, Defendant MCKENNA had supervisory authority over Plaintiff with regard to her employment.

13. At all times material, Defendant GARY SMITH (hereinafter referred to as "SMITH") was and is a Project Manager of Defendant ECD.

14. At all times material, Defendant SMITH had supervisory authority over Plaintiff with regard to her employment.

STATEMENT OF FACTS

15. ECD specializes in assisting and supporting excavation, pile drilling and foundation projects in the construction industry. Due to the use of open flames on construction sites, ECD employs fire guards.

16. Prior to Plaintiff's employment with Defendant ECD, Plaintiff worked as a security guard at the same construction sites as Defendant ECD.

17. Defendant ECD's employees would oftentimes ask Plaintiff to stand in as a fire guard, given that Plaintiff held an Occupational Safety and Health Administration (a/k/a "OSHA") certification and was licensed as a flagger and fire guard.

18. Around May 2015, Defendant MCKENNA contacted Plaintiff to offer her a permanent fire guard position with Defendant ECD at a starting hourly rate of $14.00.

19. Around July 2015, Defendants asked Plaintiff if she could refer "pretty, sexy girls" to hire as fire guards.

20. Defendants discriminated against Plaintiff on the basis of her sex/gender.

21. Plaintiff decided to look past Defendants' inappropriate comment in light of the opportunity to help her family members that were seeking employment at the time.

22. Around August 2015, Defendants hired Plaintiff's daughter at an hourly rate of

$12.00. At the time, Plaintiff was unaware of her daughter's starting hourly wage.

23. Defendants engaged in patterns, practices and/or policies of employment which willfully, and in the alternative, unwilfully, discriminated against Plaintiff on the basis of her sex/gender and by paying Plaintiff a lesser rate of pay than that paid to male employees performing the same or substantially similar job duties which require equal skill, effort, and responsibility, and under the same working conditions and at the same establishments.

24. Between July 2015 and October 2015, Plaintiff mentioned to Defendant MCKENNA that she wanted a raise. Fearful that Defendant MCKENNA would fire Plaintiff, Plaintiff decided to wait several months to raise the issue with Defendants again.

25. Around October 2015, Defendants were in need of an employee that possessed an Air Compressor License and paid for Plaintiff's air compressor and torch operation examinations.

26. Between October 2015 and November 2015, Plaintiff discovered that her male coworkers' starting hourly wages were between $20.00 to $22.00 and that they had less credentials and/or certifications than Plaintiff.

27. Plaintiff was paid less than the rate at which an employee of the opposite sex at ECD would be paid for a job requiring equal skill and performed under similar working conditions.

28. Around the last week of November 2015, Plaintiff asked Defendant MCKENNA for a raise to receive equal pay as her male coworkers and to match the market rate for a fire guard in the geographic area. Upon information and belief, Defendant MCKENNA was aware Plaintiff's hourly wage was less than the market rate. Defendant MCKENNA then told Plaintiff that he "was going to look into it."

29. At that time, Plaintiff was highly valued at ECD because of her Air Compressor license and did not receive any reprimands or bad reviews for her job performance.

30. Defendants discriminated against Plaintiff on the basis of her sex/gender.

31. Between November 2015 and June 2016, Defendants did not give Plaintiff a raise.

32. Plaintiff continued to ask Defendants for a raise and Defendants told her that they would get back to her or that she would be receiving it soon.

33. For several weeks, Plaintiff relentlessly checked her pay stubs to see if Defendants gave her a raise, but to no avail.

34. Defendants required Plaintiff perform the same or substantially the same job position as male employees, requiring equal skill, effort, and responsibility under similar working conditions at the same establishment, and paid Plaintiff a rate of pay less than such male employees. The differential rate of pay was not part of or occasioned by a seniority system, merit system, a system based on the quantity or quality of production, or upon a factor other than gender.

35. Plaintiff became increasingly frustrated by Defendants and informed Defendants that she would be forced to leave if Defendants did not give her equal pay.

36. Defendant SMITH asked Plaintiff not to leave ECD because they needed her for construction sites that required a fire guard with an Air Compressor license.

37. Around June 30, 2016, Defendants gave Plaintiff a $2.00 raise, bringing Plaintiff's hourly wage to $16.00 per hour.

38. Defendants knowingly paid Plaintiff less than her male coworkers for a job requiring equal skill and performed under similar working conditions.

39. Defendants discriminated against Plaintiff on the basis of her sex/gender.

40. Upset and disappointed, Plaintiff called Defendant MCKENNA to ask why she was still making less than her male coworkers and less than the market rate for a fire guard in the construction industry.

41. Defendant MCKENNA ignored Plaintiff's calls.

42. Around July 2016, Defendants stopped assigning Plaintiff to construction sites.

43. After several days passed, Plaintiff called the Defendants' office and asked if she was getting fired. Defendants' employee could not give Plaintiff a straight answer.

44. Defendants unlawfully terminated Plaintiff.

45. At all times material, Defendants engaged in a pattern and practice of discrimination against female employees.

46. Defendants knowingly and willfully paid females less than the rate at which an employee of the opposite sex at ECD would be paid for a job requiring equal skill and performed under similar working conditions.

47. Defendants' discriminatory treatment towards Plaintiff resulted in psychological and physical harm to Plaintiff. Defendants' actions made Plaintiff feel extremely humiliated, degraded, victimized, and emotionally distressed. Indeed, Plaintiff was unable to afford housing and was forced into poverty.

48. As a result, Plaintiff suffered and continues to suffer severe emotional distress, physical ailments, pecuniary losses, emotional pain, suffering, inconvenience, loss of enjoyment of life, and other non-pecuniary losses.

49. The Defendants' conduct was malicious, willful, and outrageous, conducted with full knowledge of the law and Plaintiff demands punitive damages against all Defendants, jointly and severally.

50. The above are some of the examples of unlawful discrimination, inequality and retaliation to which the Defendants subjected Plaintiff on an ongoing continuous basis.

51. Plaintiff claims a continuous practice of discrimination and claims a continuing

violation and makes all claims herein under the continuing violations doctrine.

AS A FIRST CAUSE OF ACTION FOR DISCRIMINATION UNDER TITLE VII (AGAINST DEFENDANT ECD)

52. Plaintiff repeats, reiterates and realleges each and every allegation made in the above paragraphs of this Complaint as if more fully set forth herein at length.

53. Title VII of the Civil Rights Act of 1964, as amended, 42 U.S.C. §2000e-2(a) [Section 703] provides that it shall be an unlawful employment practice for an employer: "(1) to fail or refuse to hire or to discharge any individual, or otherwise to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's race, color, religion, sex, or national origin; . . ."

54. The exact number of employees at ECD is unknown, but upon information and belief, there are well more than the statutory minimum.

55. Defendant ECD engaged in unlawful employment practices prohibited by 42 U.S.C. §2000e *et seq.*, by subjecting Plaintiff to discrimination on the basis of her sex/gender.

56. Defendant ECD violated the above and Plaintiff suffered numerous damages as a result.

AS A SECOND CAUSE OF ACTION FOR RETALIATION UNDER TITLE VII (AGAINST DEFENDANT ECD)

57. Plaintiff repeats, reiterates and realleges each and every allegation made in the above paragraphs of this complaint as if more fully set forth herein at length.

58. Title VII of the Civil Rights Act of 1964, as amended, 42 U.S.C. §2000e-3(a) provides that it shall be unlawful employment practice for an employer: "(1) to . . . discriminate against any of his employees . . . because [s]he has opposed any practice made an unlawful employment practice by this subchapter, or because [s]he has made a charge, testified, assisted or

participated in any manner in an investigation, proceeding, or hearing under this subchapter."

59. The exact number of employees at ECD is unknown, but upon information and belief, there are well more than the statutory minimum.

60. Defendant ECD engaged in unlawful employment practices prohibited by 42 U.S.C. §2000e *et seq.*, by retaliating against Plaintiff with respect to the terms, conditions or privileges of employment because of her opposition to the unlawful employment practices of Defendants.

61. Defendant ECD violated the above and Plaintiff suffered numerous damages as a result.

AS A THIRD CAUSE OF ACTION FOR DISCRIMINATION AND RETALIATION UNDER THE EPA
(AGAINST ALL DEFENDANTS)

62. Plaintiff repeats and realleges each and every allegation made in the above paragraphs of this complaint.

63. Plaintiff claims Defendants violated the EPA, 29 U.S.C. §206(d)(1), which provides as follows:

> (1) Prohibition of sex discrimination. No employer having employees subject to any provisions of this section shall discriminate, within any establishment in which such employees are employed, between employees on the basis of sex by paying wages to employees in such establishment at a rate less than the rate at which he pays wages to employees of the opposite sex in such establishment for equal work on jobs the performance of which requires equal skill, effort, and responsibility, and which are performed under similar working conditions, except where such payment is made pursuant to (i) a seniority system; (ii) a merit system; (iii) a system which measures earnings by quantity or quality of production; or (iv) a differential based on any other factor other than sex: Provided, That an employer who is paying a wage rate differential in violation of this subsection shall not, in order to comply with the provisions of this subsection, reduce the wage rate of any employee.
>
> (2) No labor organization, or its agents, representing employees of an employer having employees subject to any provisions of this section shall cause or attempt to cause such an employer to discriminate against an employee in violation of

> paragraph (1) of this subsection.
>
> (3) For purposes of administration and enforcement, any amounts owing to any employee which have been withheld in violation of this subsection shall be deemed to be unpaid minimum wages or unpaid overtime compensation under this chapter.

64. Plaintiff, as a female, was discriminated against by Defendants because of her sex/gender and has suffered damages as set forth herein. Defendants paid Plaintiff less than similarly situated male employees.

65. Plaintiff also claims unlawful retaliation under the EPA for her opposition to Defendants' unlawful employment practices.

AS A FOURTH CAUSE OF ACTION FOR DISCRIMINATION
UNDER NYSHRL § 296
(AGAINST ALL DEFENDANTS)

66. Plaintiff repeats and realleges each and every allegation made in the above paragraphs of this Complaint as if set forth more fully herein.

67. NYSHRL § 296 provides that "It shall be an unlawful discriminatory practice: (a) For an employer or licensing agency, because of the age, race, creed, color, national origin, sex, or disability, or marital status of any individual, to refuse to hire or employ or to bar or to discharge from employment such individual or to discriminate against such individual in compensation or in terms, conditions or privileges of employment."

68. Defendants violated the section cited herein by creating and maintaining discriminatory working conditions, and otherwise discriminating against the Plaintiff because of her sex/gender, and subjecting Plaintiff to a hostile work environment.

69. Plaintiff hereby makes a claim against Defendants under all of the applicable paragraphs of NYSHRL §296.

70. Defendants violated the above and Plaintiff suffered numerous damages as a result.

AS A FIFTH CAUSE OF ACTION FOR RETALIATION UNDER NYSHRL §296(7)
(AGAINST ALL DEFENDANTS)

71. Plaintiff repeats and realleges each and every allegation made in the above paragraphs in this Complaint as if set forth more fully herein.

72. NYSHRL §296(7) provides that it shall be an unlawful discriminatory practice: "For any person engaged in any activity to which this section applies to retaliate or discriminate against any person because he has opposed any practices forbidden under this article."

73. Defendants engaged in an unlawful discriminatory practice by retaliating against Plaintiff.

74. Defendants violated the above and Plaintiff suffered numerous damages as a result.

AS A SIXTH CAUSE OF ACTION FOR AIDING AND ABETTING
UNDER NYSHRL §296(6)
(AGAINST DEFENDANT MCKENNA AND DEFENDANT SMITH)

75. Plaintiff repeats and realleges each and every allegation made in the above paragraphs of this complaint as if set forth more fully herein.

76. NYSHRL §296(6) further provides that "It shall be an unlawful discriminatory practice for any person to aid, abet, abet, incite, compel or coerce the doing of any of the acts forbidden under this article, or to attempt to do so."

77. Defendant MCKENNA and Defendant SMITH engaged in an unlawful discriminatory practice prohibited by NYSHRL §296(6), by aiding, abetting, compelling and/or coercing the discriminatory behavior as stated herein.

78. Defendants violated the above and Plaintiff suffered numerous damages as a result.

AS A SEVENTH CAUSE OF ACTION FOR DISCRIMINATION IN WAGES &
RETALIATION UNDER NEW YORK LABOR LAW § 194
(AGAINST ALL DEFENDANTS)

79. Plaintiff repeats and realleges each and every allegation made in the above

paragraphs of this complaint as if set forth more fully herein.

80. New York Labor Law § 194 provides that:

> "No employee shall be paid a wage at a rate less than the rate at which an employee of the opposite sex in the same establishment is paid for equal work on a job the performance of which requires equal skill, effort and responsibility, and which is performed under similar working conditions, except where payment is made pursuant to a differential based on:
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> a. a seniority system;
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> b. a merit system;
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> c. a system which measures earnings by quantity or quality of production; or
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> d. a bona fide factor other than sex, such as education, training, or experience. Such factor: (i) shall not be based upon or derived from a sex-based differential in compensation and (ii) shall be job-related with respect to the position in question and shall be consistent with business necessity. Such exception under this paragraph shall not apply when the employee demonstrates (A) that an employer uses a particular employment practice that causes a disparate impact on the basis of sex, (B) that an alternative employment practice exists that would serve the same business purpose and not produce such differential, and (C) that the employer has refused to adopt such alternative practice."

81. Defendants required Plaintiff to perform the same or substantially the same job position as male employees, requiring equal skill, effort, and responsibility under similar working conditions at the same establishment, and paid Plaintiff less than such male employees. The differential rate of pay was not part of or occasioned by a seniority system, merit system, a system based on the quantity or quality of production, or upon a bona fide factor other than gender, such as education, training, or experience.

82. Defendants engaged in patterns, practices and/or policies of employment which willfully, and in the alternative unwillfully, discriminated against Plaintiff on the basis of sex/gender by paying Plaintiff a lesser rate of pay than that paid to male employees performing the same or substantially similar job duties which require equal skill, effort, and responsibility, and under the same working conditions and at the same establishment.

83. Additionally, New York Labor Law § 194 provides that “No employer shall prohibit an employee from inquiring about, discussing, or disclosing the wages of such employee or another employee.”

84. Defendants engaged in an unlawful discriminatory practice by retaliating against Plaintiff.

85. Defendants violated the above and Plaintiff suffered numerous damages as a result.

86. As a direct and proximate result of Defendants’ unlawful, discriminatory, and retaliatory conduct in violation of the New York Labor Law, Plaintiff suffered, and continues to suffer, harm for which she is entitled to an award of monetary damages and other relief.

AS AN EIGHTH CAUSE OF ACTION FOR AIDING AND ABETTING UNDER NYCHRL §8-107(6) (AGAINST DEFENDANT MCKENNA AND DEFENDANT SMITH)

87. Plaintiff repeats and realleges each and every allegation made in the above paragraphs of this complaint as if set forth more fully herein.

88. NYCHRL §8-107(6) further provides that “It shall be an unlawful discriminatory practice for any person to aid, abet, incite, compel or coerce the doing of any of the acts forbidden under this chapter, or to attempt to do so.”

89. Defendant MCKENNA and Defendant SMITH engaged in an unlawful discriminatory practice prohibited by NYCHRL, by aiding, abetting, compelling and/or coercing the discriminatory behavior as stated herein.

90. Defendants violated the above and Plaintiff suffered numerous damages as a result.

AS A NINETH CAUSE OF ACTION FOR RETALIATION UNDER NYCHRL §8-107(7) (AGAINST DEFENDANT MCKENNA AND DEFENDANT SMITH)

91. Plaintiff repeats and realleges each and every allegation made in the above

paragraphs of this complaint as if set forth more fully herein.

92. NYCHRL §8-107(7) further provides that "It shall be an unlawful discriminatory practice for any person engaged in any activity to which this chapter applies to retaliate or discriminate in any manner against any person because such person has (i) opposed any practice forbidden under this chapter….the retaliation or discrimination complained of under this subdivision need not result in an ultimate action with respect to employment, or in a materially adverse change in the terms and conditions of employment, provided, however, that the retaliatory or discriminatory act or acts complained of must be reasonably likely to deter a person from engaging in protected activity

93. Defendants violated NYCHRL §8-107(7) by ignoring Plaintiff's phone calls and ultimately terminating Plaintiff as stated herein.

94. Defendants violated the above and Plaintiff suffered numerous damages as a result.

WHEREFORE, Plaintiff respectfully requests a judgment against the Defendants:

A. Declaring that the Defendants engaged in unlawful employment practices prohibited by Title VII, the EPA, the New York State and City laws against Discrimination, Retaliation, and Unequal Pay, and that Defendants discriminated and retaliated against Plaintiff because of her sex/gender;

B. Awarding damages to the Plaintiff to make Plaintiff whole for any losses suffered as a result of such unlawful employment practices;

C. Awarding Plaintiff reinstatement;

D. Awarding Plaintiff compensatory damages for mental, emotional and physical injury, distress, pain and suffering and injury to her reputation;

E. Awarding liquidated damages against all Defendants, jointly and severally;

F. Awarding Plaintiff punitive damages against all Defendants, jointly and severally;

G. Awarding Plaintiff attorneys' fees, costs, and expenses incurred in the prosecution of the action;

H. Awarding Plaintiff such other and further relief as the Court may deem equitable, just and proper to remedy the Defendants' unlawful employment practices.

JURY DEMAND

Plaintiff requests a jury trial on all issues to be tried.

Dated: October 20, 2017
New York, New York

DEREK SMITH LAW GROUP, PLLC
Attorneys for Plaintiff

By: ______________________
Melissa Mendoza, Esq.
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New York, New York 10119
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CERTIFICATE OF SERVICE

I, Melissa Mendoza, hereby certify that on October 20, 2017, the foregoing document was filed with the Clerk of the Court and served in accordance with the Federal Rules of Civil Procedure, and/or the Eastern District's Local Rules, and/or the Eastern District's Rules on Electronic Service, which will send notification of such public filing to all counsel registered to receive such notice.

/s/ Melissa Mendoza
MELISSA MENDOZA